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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-439

HAROLD MICHAEL McSPADDEN,
Petitioner,

v.

THE PEOPLE OF THE STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF OHIO

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The petitioner, Harold Michael McSpadden, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Ohio entered on May 21, 1975.

OPINION BELOW

The Opinion, Decision and Journal Entry of the Court of Appeals of Lucas County, Ohio, appears in Appendix B, hereto. The judgment of the court below, the Common Pleas Court, Lucas County, Ohio, was affirmed November 16, 1973. As to the issue here on petition, Brown and Wiley, JJ., concurred; Potter, P.J., made a strong dissent.

No opinion was rendered by the Common Pleas Court for Lucus County, Ohio.

The Opinion of the Supreme Court of Ohio, appears in Appendix A hereto. The judgement of the Court of Appeals Lucas County, Ohio, was affirmed on May 21, 1975. As to the issue here on petition, Herbert, Celebreeze, W. Brown and P. Brown, JJ., concurred; O'Neil, C.J., and Stern, J., dissented, with Stern, J., writing a strong opinion.

The Order Affirming the Judgment of the Court of Appleas for Lucas County, and the Mandate of Court to the Common Pleas Court for Lucas County also appear in Appendix A.

The Order of the Supreme Court of Ohio, Denying a petition for a Rehearing, dated June 19, 1975, appears in Appendix A., hereof.

JURISDICTION

The judgement of the Ohio Supreme Court was entered on May 21, 1975, affirming· petitioner's conviction dated August 19, 1972, and the judgment of the Court of Appeals dated November 26, 1973. The Ohio Supreme Court denied a timely petition for rehearing on June 19, 1975 (Appendix A.), and this petition was filed within 90 days of that date. Petitioner has been incarcerated since being sentenced by the trial court.

The jurisdiction of this Court is invoked under the Constitution of the United States, Article III § 2, the Supreme Court Rules, Part V (Rule 19), and under 28 USC §1257 (3).

QUESTIONS PRESENTED

I. Was petitioner denied his rights under the Fourth Amendment to the Constitution of the United States to be secure in his effects against unreasonable searches and seizures by the admission of the fruits of a warrantless search and seizure in the trial; when the fruits of that search, subsequent searches, and arrest were the products of a joint private and law-enforcement endeavor to open and inspect a locked suitcase (checked in a public baggage room, where there was no abandonment, probable cause, or exigent circumstances and where there was no contractual consent to inspect given the baggage department employees and where the bag was not a part of intra or interstate commerce)?

II. Can a search be characterized as being soley a private search, where it did not and could not have occurred without the City of Toledo Police Officers first picking the two

locks to the suitcase, thus providing access into the interior of the suitcase; when the private parties had made repeated attempts to open the suitcase, strictly without police aid, and had failed?

III. Do the sanctions contained within the Fourth and Fifth Amendments apply to the States through application of the Fourteenth amendment?

IV. Can the fruits and products of an unreasonable search and seizure be used at trial?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Fourth, Fifth and Fourteenth Amendments to the United States Constitution. The provisions are printed in Appendix D.

STATEMENT OF THE CASE

Two appeals were consolidated for argument and disposition by the Ohio Supreme Court. They arose out of an indictment returned by the Lucas County Grand Jury on November 10, 1971, charging Alan Murray Morris and Harold Michael McSpadden, together with one Willie Middlebrook, with two counts, namely: (1) Conspiracy to violate R.C. 3719.09, possesion of a narcotic drug, and (2) possession or control of a narcotic drug, on or about October 31, 1971, for purposes of sale. A related and identical two-count indictment was returned the same day against Joaquin (John) Ramos.

Prior to trial, motions to suppress were filed by defendants.

A hearing was held upon the motions to surpress, and, on May 26, 1972, the motions were overruled. Subsequently, defendant McSpadden filed a motion to reconsider suppression of evidence, which was overruled.

The trial commenced on August 10, 1972, and, on August 19, 1972, the jury returned a verdict finding the defendant Morris guilty on both counts of the indictment, conspiracy to violate R.C. 3719.09, possession of a narcotic drug, and possession for sale. McSpadden was found guilty on the first count, conspiracy to violate R.C. 3719.09, possession of a narcotic drug, and, on the second, guilty of possession of a narcotic drug, a lesser included offense of the charge, possession for sale. Judgments were entered upon the verdicts.

Motions for a new trial were filed on August 22, 1972, and overruled. Thereafter, appeals were filed and on November 26, 1973, the Court of Appeals affirmed the judgments of the Court of Common Pleas.

Subsequent to the decision reached by the Court of Appeals, the Ohio Supreme Court granted leave to appeal. The Ohio Supreme Court affirmed the judgment of the Court of Appeals in the consolidated cases on May 21, 1975. The Ohio Supreme Court declined to rehear the appeal on June 19, 1975.

FACTS

The suitcase in question was checked in at the baggage room of the Penn Central Railroad Terminal in Toledo, Ohio, at approximately 11:13 a.m. on Wednesday, October 20, 1971. The baggage agent then on duty, Milton E. Julert, testified that a man, he later identified as Joaquin Ramos, brought in the suitcase and sought to deposit it at the bag-

gage room. Julert suggested that the suitcase be placed in a coin locker on the main concourse of the terminal where it would be safer. The man insisted, however, that it be checked into the baggage room. He stated that he would leave it for a day or two.

Julert thought that the circumstances under which the bag was deposited were unusual and gave him cause for concern.

On Saturday, October 23, baggage agent Sibold noticed that the suitcase was still there and was aware that it was expected to remain there only a day or two. Sibold then proceeded to make an examination of the bag, noting the bag's weight and the "swishing" sound it produced.

On Tuesday, October 26, Sibold, observing that the bag had not yet been picked up, asked Julert why he had not contacted the Penn Central Police Department regarding the bag and the manner in which it had been checked. According to Sibold's testimony, Julert responded that he intended to. When, on the following day, October 27, Sibold saw the bag was still there, he spoke with Captain Albert Blevins of the Penn Central police, relating the circumstances regarding the checking of the bag, the length of time it had been left, its weight, and the unusual sound emanating from within, and expressing a desire to open the suitcase. Sibold stated that his reasons for wanting the bag opened were based upon the excessive weight, sound, and circumstances under which it was checked, which led him to worry that the bag might contain explosives or a bomb and should be opened for the protection of the company. Both men then proceeded to attempt to find keys with which the bag might be opened. The keys which the men tried in the lock failed to open it. Blevins told Sibold that he would try to get assistance in unlocking

the bag and that afternoon called Detective George Ryan, a personal friend, and his primary contact with the Toledo Police Departmen. Blevins stated that he was concerned about the contents of the bag after he had made an examination of its exterior similar to that of Julert and Sibold. He thought there might be a bomb in it but felt that handling the bag was not likely to explode it. Blevins and Sibold also stated that the presence of a Penn Central security officer at the opening of unclaimed or suspicious luggage was usually sought in order to witness the opening and thereby protect Penn Central personnel from accusations of theft or damage to the contents occurring during such opening. Blevins then stated that, when he called Detective Ryan, he asked merely for advice as to how to unlock a locked suitcase.

On Thursday, October 28, Detective Ryan accompanied by Officer Harry Bedal, of the Toledo Police Armory who had experience in opening locks, were enroute to the Toledo Penn Central Terminal when they met Detective Robert Beavers. Beavers, who was, at that time, assigned to the Metropolitan Drug Unit along with Detective Ryan, was invited to join them. Arriving at the baggage room, Officer Bedal, in the presence of Sibold, Blevins, Ryan, and Beavers, proceeded to unlock the bag's latches successfully with the aid of two paper clips. Sibold then opened the latches on each end and spread the suitcase open. The record is not clear as to who directed Sibold to open the case, but Sibold does state, at one point, "And then I was told that it was Penn Central property, to open it up." After it had been opened, the assembled group observed a number of cellophane bags containing white powder and some towels. Detective Beavers picked up a bag with the initial "C" on it, opened and examined it, showing it to Detective Ryan. The officers had reason to believe the bag contained

narcotics and requested a field test kit be brought from the Metropolitan Drug Unit.

The officers' field test indicated a positive result for cocaine from the bag marked "C," and the officers took the bags to a laboratory for further examination. The laboratory examination established that the bags contained the narcotics heroin and cocaine.

On October 31, 1971, combined federal and state agent's surveillance of the Penn Central Terminal by Toledo police resulted in the observation of the appellant and co-defendant Willie Middlebrook driving up to the terminal. Co-defendant Middlebrook entered the terminal and presented the claim check for the bag at the baggage room desk and obtained the suitcase. Appellant Morris entered the terminal and met Middlebrook on the main concourse level where Middlebrook attempted to hand the bag to Morris. At this time, Morris and Middlebrook were arrested by Toledo police officers who had been observing them. Subsequently, appellant McSpadden who had been sitting in the back seat of the car in which the three had arrived was also arrested.

REASONS FOR GRANTING THE WRIT

I.

A writ of certiorari should be granted in order for this court to update the decision and doctrine regarding private searches set down in the year 1921, in the case of *Burdeau v. McDowell,* 256 U.S. 465, which said that evidence seized as the result of a private search is admissible in a prosecution for the reason that the Fourth Amendment does not apply to private citizens as opposed to government agents.

While the general guide line still holds in the light of modern events, practices, technology etc. it has left a grey area. *Burdeau, supra,* does not give sufficient guidelines to permit lower courts to determine at what point the private search leaves off being strictly private. It does not give a guideline to govern the acts of the police once they learn a private search is in process or has been completed.

It is submitted that what is needed is a very simple rule, viz: that in order to use the results of a private search, the police must treat the information from that private person as probable cause to secure a warrant; just as they use the reliable informer, or in exigent circumstances they could proceed at once without a warrant given the probable cause that would otherwise satisfy warrant requirements.

The instant case shows the need for Supreme Court guidance in this area. In total, some nine appeals court justices have sat on this case in the search and seizure issue. They have split six to three, as to whether this was a private search or was tainted by police participation in the search. This same result has been obtained all over the United States. The courts have by and large developed lower court law applying *Burdeau, supra,* at least far enough to dispose of the cases before them; however, decisions between jurisdictions and courts are so disparate that a decision to amplify *Burdeau* is needed. A Supreme Court decision that warrant requirements could be met utilizing the information from the private source to satisfy probable cause is mandated, else the police by artifice and working through private citizens can avoid the requirements of the Fourth Amendment. The Fourth Amendment is a nullity in light of the present practices regarding private searches. The Fourth Amendment has been zealously guarded in this country, but here lies an immunity from the requirements that should not be condoned.

It is a simple fact that most private searches are burglaries. When the police have knowledge of such burglaries, they are duty bound to arrest and stop the perpetrators. To give a burglar immunity in order to use what he provides against another criminal is not to be condoned. The recent "Watergate" scandal that revealed government instigation of unlawful breakings and enterings led to the convictions of many persons and the resignation of the President of the United States. The actors in that case thought they were doing right because high authorities in government told them to act. This established the law that where an actor in good faith performs, he must still be wary lest the act itself be unlawful, even though he believes that he acts under lawful authority.

Opinions were handed down in the case of *United States v. Russo,* Crim. No. 9373 (CD Cal., 1973), where the indictment was quashed because of illegal entry into the office of Mr. Ellsberg's psychiatrist by agents of the government, and in the case of *United States v. McCord,* 509 F. 2d 334 (1974), in which the defendant claimed he acted in good faith performing an unlawful entry, because he was acting under orders of persons high up in government. The "McCord" court said:

> "It is also desirable that the government should not itself foster and pap for the other crimes, when they are the means by which the [conviction] is to be obtained.
>
> This principle is not strictly limited to situations in which the defendant has suffered arguable prejudice by reason of the prosecutorial conduct. This is so because the principle is not one of fairness to the defendant alone but rather, in Justice Brandeis' words, is one designed to 'maintain respect for law; . . . to promote confidence in the administration of justice; . . . to preserve the judicial process from contamination . . . our government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare the government may commit crimes in order to secure the conviction of a private crminal—would bring terrible retribution'. (Citations omitted.)
>
> We may take judicial notice that this is in fact being done. In sum, we are not here faced with a choice between convicting criminals and decrying lawless government conduct—the two are one and the same in this case and we may achieve both goals by affirming McCord's conviction." [350, 351, McCord, *supra*].

In the instant case we have police performing lockpicking which laid open to plain view the contents of a locked suitcase not within the immediate control of the owner, but where the owner had relied on a right to privacy (he left it in the care of the baggage agent in a locked condition). He did not leave the key to the suitcase with the baggage agent. He never intended to create a joint occupancy or use of the interior of that suitcase.

This court should grant the writ to inquire into whether or not the products of a police burglary may be used in evidence at the trial.

The court should also grant the writ to determine if the police can accept for use as evidence the products of any private burglary for such use makes the police a co-

conspirator and accomplice to a criminal act. Such conduct makes the products of a burglarous search tainted by the very means by which they were obtained.

Combining the police burglary and the private burglary in the case at bar, is it permissible to use the fruits as evidence against the accused? We think not, and the writ should issue lest an injustice be done.

Further, the writ should issue to determine if the search and seizure even falls within the permissible scope of the "Burdeau" decision. That it does not fall within the doctrine is shown as follows:

Surely, a decision is mandated to clear up this grey area. Here, a railroad employee was suspicious of a suitcase checked in the baggage room. The suitcase was brought in off-the-street, and was not part of baggage intended to be entrained. The only contract entered into was the claim check, secured for a deposit. The claim check only stated: that bags left for 60 days might be then sold for outstanding charges. No mention appeared on the ticket of any right to inspection of the baggage that the railroad claimed. No right to inspect the baggage existed, as was shown in the trial testimony: (Trial, transcript page 102).

Witness: Railroad Police Captain Blevins, the highest official of the railroad to testify:

> Q. (By Mr. O'Connell): Did you ever claim any legal right to open the bags of people that left them there?
>
> A. I didn't have any right to open the bag myself, sir.
>
> Q. Did you ever claim any right for the baggage master to open bags?
>
> Prosecutor: Objection.
>
> A. I don't claim any right.

The luggage agent made repeated attempts to open the locked suitcase and failed. Other railroad employees also failed to open the suitcase. The railroad police then enlisted the aid of the local police to pick the lock so they could examine the interior of the bag. Mere suspicion was all the railroad had. The police obligingly came and picked the locks and the railroad employee opened the bag. The police were present and observed narcotics, once the bag was opened to view. It is self-evident that: the contents of the bag would not have come to view had not the police picked the locks. This search is offensive to the Fourth Amendment! As stated before, one third of the appeals judges believe it is offensive, the others believe it is not. Such split indicates this Court should determine whether or not the search was offensive to the mandate of the Fourth Amendment.

I.

[Petitioner hereby adopts the dissenting opinions of the Justice of the Court of Appeals for Lucas County and the dissenting Justices of the Supreme Court of Ohio, for he verily believes those opinions correctly state the reasons for overruling the judgment of the Supreme Court of the State of Ohio, and for the reason he could not better argue the issue himself.]

"Potter, P.J., finds that the search was an unlawful warrantless police search and not a private search and that federal court decisions relative to the exclusionary rule are applicable. (See *Lustig v. United States,* 338 U.S. 74; *Corngold v. United States,* 367 F.2d 1 (1966); for additional cases see, 68 Am. Jur. 2d. 670, Searches and Seizure, Sec. 13, *et seq.;* 36 ALR 3d 533 at 559), that defendant's constitutional rights were not extinguished by the relatively

brief passage of time (See time referred to on baggage claim check) the area was one in which there was a reasonable expectation of freedom from governmental intrusion."

Stern, J., The mandate of the Fourth Amendment is that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated • • • ." In order to ensure that security, the Amendment provides that searches and seizures be upon warrant and probable cause. Where a search is made without a warrant, it is *per se* unreasonable except for a few familiar exceptions. *Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971); *Katz* v. *United States,* 89 U.S. 347 (1947). On the facts of this case, I can find no basis for finding that the warrantless search and seizure herein comes within any of these exceptions, and I accordingly dissent.

Searches conducted outside the judicial process, without the prior approval of a judge or magistrate, are *per se* unreasonable under the Fourth Amendment, for to grant the police authority to decide whether there is adequate evidence to justify their search without a warrant "would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers." *Johnson* v. *United States,* 333 U.S. 10, 14 (1948). A search without warrant may be reasonable where "the exigencies of the situation made that course imperative" *(McDonald* v. *United States,* 335 U.S. 451, 456 [1948], if the police activity is predicated not only upon probable cause, but also upon a need for immediate action to prevent personal injuries, escape of persons accused of committing a crime, or destruction, removal or concealment of evidence. *Warden* v. *Hayden,* 387 U.S. 294 (1967); *Ker* v. *California,* 374 U. S. 23 (1963). But it is simply not true that any

exigent circumstances existed which would justify the action of the police in this case. The police did not arrive to open the suitcase until the day after they were called, and they certainly could have applied for a warrant before the search—or, indeed, they could have taken the suitcase itself to a magistrate. To allow such a search as was conducted here needlessly sacrifices the public interest in the privacy and security of an individual's possessions.

The majority suggest, at least by implication, that the suitcase was suspicious by reason of the sounds emanating from it, its weight, the demeanor of the person who checked it, and the length of time it was checked. Yet not one of these facts, and no combination of them, provide any reasonable basis for a warrantless search claimed to be for the purpose of protecting the public safety. It is claimed that the bag felt unusually heavy. Is that any indication that it might have held a bomb—or narcotics, or books, or any one of the other objects one might imagine? The suitcase made a "rustling" sound when moved. If there is some sinister implication from that sound it escapes me; certainly, it seems most unlikely that explosives "rustle." The man who checked the bag was "tense and nervous." Does that suggest that the bag contained a bomb? The bag was left for a few days longer than expected. Wouldn't this lapse of time indicate, if anything at all, that the contents were probably innocent? None of these "suspicions" reflects anything other than certain differences between this bag and the millions of others that pass through the hands of common carriers every years. There were no suspicious sounds, no odors, no leakages, no threats or past incidents suggesting any danger to the public safety. In particular, this is not a case in which any bomb threat was made or, in which there was any other reasonable basis for suspecting an imminent danger to the public safety. The circum-

stances surrounding the actual opening of the bag also dispel any contention that its potential contents engendered fear of imminent danger in either the railroad employees or the police; the opening occurred in a small room and was attended by five people who crowded around the bag. By the majority's decision, it is difficult to avoid the conclusion that the police are now at liberty to open anyone's baggage upon the request of any private citizen, without the need to justify the search before an independent magistrate.

The majority concludes that the restrictions of the Fourth Amendment are not applicable to these appeals because the train station search was a private search. Although I disagree with that conclusion, I agree with the majority that the standards developed by the United States Supreme Court for determining, under the now defunct "silver platter" doctrine, the degree of federal participation which mandates invocation of the Fourth Amendment to an otherwise state search are analogous to, and helpful in, determining that degree of police participation which is sufficient to require that a search which is otherwise private comply with constitutional rules. However, I believe that the majority, while purporting to apply the standards announced in *Byars* v. *United States*, 273 U.S. 28 (1927), does nothing more than cite that case. To me, *Byars* is the only reliable United States Supreme Court decision in this area.[4]

[4] A subsequent case, *Lustig* v. *United States* (1949), 338 U.S. 74, also involved federal participation in a state search. In a 5-4 decision, the court held that the federal participation was such as to require application of the Fourth Amendment. The judgment of the court was announced in an opinion written by Mr. Justice Frankfurter. The clear import of this opinion was that a search is a federal search if there was

(continued on next page)

The material facts in *Byars* are relatively simple. A state search warrant was issued by an Iowa judge to "'any police officer of Des Moines, Polk County, Iowa'" (273 U.S., at 29); the warrant authorized the search of the residence of A. J. Byars for intoxicating liquor, instruments and materials. For reasons not germane to this discussion, the court stated that the warrant was defective under Fourth Amendment standards. The warrant was given to a Mr. Densmore, the local police officer in charge of the night liquor bureau. He and three other local officers proceeded to execute the warrant. However, before leaving the police station to conduct the search, Densmore asked a federal prohibition agent to accompany the search party; the agent assented. At the residence, the federal agent searched the kitchen and found counterfeit liquor stamps. A local officer found and immediately turned over to the federal agent similar stamps. The stamps were used to convict Byars of a federal crime.

In a unanimous opinion, the court, at pages 32 and 33, held that the search and seizure was subject to the Fourth Amendment:

(continued from preceding page)

any federal participation in the search and seizure prior to actual appropriation of the seized objects from the premises searched. Stated negatively, the thrust of the opinion was that a search and seizure is not a federal undertaking only if the illegally seized objects are appropriated by the state agents and then delivered to the federal agents "on a silver platter" (338 U.S., at 79).

Applying this rule to the facts of the present appeals would require invocation of the Fourth Amendment to the October 28th depot search and seizure. The police participation in the search clearly occurred prior to appropriation of the suitcase and its contents. In fact, the police were the appropriating parties; the Penn Central agents did not seize the bag and then turn it over to the police.

"While it is true that the *mere* participation in a state search of one who is a federal officer does not render it a federal undertaking, the court must be vigilant to scrutinize the attendant facts with an eye to detect and a hand to prevent violations of the Constitution by circuitous and indirect methods. Constitutional provisions for the security of person and property are to be liberally construed, and 'it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon'. *Boyd* v. *United States,* 116 U.S. 616, 635; *Gouled* v. *United States, supra,* 304. [255 U.S. 298.]

"*The attendant facts here reasonably suggest that the federal prohibition agent was not invited to join the state squad as a private person might have been, but was asked to participate and did participate as a federal enforcement officer, upon the chance, which was subsequently realized, that something would be disclosed of official interest to him as such agent.* The house to be searched contained only four rooms—a dining room, a kitchen and two bedrooms. We are not prepared to accept the view that the local officer thought a force of four men would be insufficient to search these limited premises; and it is significant, in that connection, that he did not ask his superior officer for additional help, but inquired particularly for Adams, who, he knew, was the federal agent. The stamps found were not within the purview of the state search warrant, nor did they relate in any way to a violation of state law. Those found by the agent were held by him as of right and without question; those found by the state officer were considered by both the local officer in charge and the federal agent as things which concerned the federal government alone and then and there were surrendered to the exclusive possession of the federal agent,—a practical concession that he was present in his federal character. *We cannot avoid the conclusion that the participation of the agent in the search was under color of his federal office and that the search in substance and effect was a joint operation of the local and federal officers.* In that view, so far as this inquiry is concerned, the effect is the same as though he had engaged in the undertaking as one exclusively his own." (Emphasis added.)

The *Byars* case counsels that if police are present when private citizens conduct an unlawful search, the determinative issue in resolving whether constitutional restrictions are applicable is the character of the police presence. If the police were present primarily upon the chance that something of official interest might be discovered, compliance with the Fourth Amendment is required.

One reason given by the majority to support its conclusion that the October 28th search was a private search is the fact that the search "was instigated by private individuals, for private purposes * * * ." However, the mere fact that the police do not initiate a search does not preclude a finding that the police joined in the search to fulfill an investigative function. Such a finding would convert the search from an exclusively private search into a joint venture between the police and the private individuals.

The majority states that the police "had every right to be present at the unlocking and opening of the bag in pursuance of their duty to safeguard the safety of the community from the threat of harm." To the extent that this statement indicates the majority's conclusion that the police presence and activity in unlocking the suitcases was justified by exigent circumstances, it simply is a contradiction of the facts in the record. However, to the extent that it reflects the majority's conclusion that the police

went to the train station primarily to ascertain the contents of the suitcase, it is accurate. Their purpose was to search the suitcase, and a warrant should have been obtained before that search.

The "community caretaking function" mentioned in *Cady* v. *Dombrowski*, 413 U.S. 433 (1973), also does not apply. Any search in the interest of the public safety must have some reasonable basis. In *Cady, supra*, there was some cause for the belief that an off-duty police officer had to carry a revolver at all times and it was standard procedure to retrieve a police service revolver to prevent vandals from getting the weapon. Although the principles underlying that decision are not clear, it appears that the special rules applicable to automobile searches, the fact of a type of police custody of the vehicle, and the existence of exigent circumstances stemming from the difficulties of rural police practice were basic to the decision in that case. Most importantly, the critical factor was the searcher's reasonable belief that the automobile contained a dangerous, but not illegal, object. None of those factors are present here, and the unusual facts of that case provide no support for the proposition that a search claimed to be for the public safety is somehow not subject to the usual requirement that a warrant be obtained, absent exigent circumstances. See *Almeida-Sanchez* v. *United States*, 413 U. S. 266 (1973). If there were reasonable grounds for belief that the public safety required a search, that search could have been carried out under a proper warrant as readily as under police discretion. The majority suggests no reason why a search for purposes of the public safety should not be subject to the usual requirement that a warrant be obtained, nor can I accept the implication that a police search which is not part of a criminal investiga-

tion is any less an intrusion upon privacy or any less subject to the Fourth Amendment.

The reliance of the majority upon the "plain view" doctrine is similarly misplaced. As was stated in *Coolidge* v. *New Hampshire*, 403 U.S. 443, 466 (1971): "What the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused." Even if the search in the present case is somehow considered to be a private search for explosives, the "plain view" doctrine alone would not permit the police to seize the narcotics in the suitcase, because "no amount of probable cause can justify a warrantless search or seizure absent exigent circumstances," even where the article seized in contraband. *Coolidge* v. *New Hampshire, supra*, at 468. A private person making a search has no right to seize property, even contraband, and there is no logic in considering a search to be private until the moment at which the seized object comes into plain view, and then finding that the right to seize derives from the fact that police officers, heretofore considered as private persons, have the object in "plain view." The mere fact that an object subject to seizure is in plain view does not eliminate the requirement of a search warrant, absent exigent circumstances, for the "plain view" rule only applies where the initial police intrusion was lawful. Here, the police were, at best, participants in an unlawful private search, and at worst, conducting a police search in violation of the Fourth Amendment. The police intrusion in this case was the picking of the suitcase locks in order to open the bag, and this intrusion was unlawful, without warrant, and not made under exigent circumstances. This wrongful instrusion is

not a basis upon which the "plain view" rule can be applied.

A second requirement of the "plain view" rule is that the discovery of evidence must be inadvertent. It is clear that the purpose of the Toledo police was to participate in a baggage search, and that if explosives had been found, the explosives would have been liable to seizure, or at least to use as evidence against the owner of the bag. They would incriminate as surely as narcotics. It is absurd to argue in this situation that the discovery of the contents of the suitcase was in any way inadvertent, since their discovery was precisely the purpose for breaking into the suitcase. In Fifth Amendment cases, the fact that a judicial inquiry is not for the immediate purpose of criminal prosecution does not prevent the assertion of the privilege against self-incrimination; so too in Fourth Amendment cases the fact that a warrantless search was for one type of evidence does not act as a bootstrap to justify the seizure and use of evidence of a different kind, for the unwarranted invasion of privacy remains the same.

The cases applying the Fourth Amendment to warrantless search and seizure cannot be reconciled into a set of simple principles. In many of those cases, there is a tension between two conflicting approaches. One approach considers that if a police search is subsequently found to be reasonable, no warrant is necessary, since the warrant requirement applies only to unreasonable searches. The majority apparently adopts that approach in this case. The other approach recognizes that the primary protection of the Fourth Amendment against unbridled police discretion lies in the requirement that a warrant be obtained from an impartial magistrate, and that the fundamental guarantees of the Fourth Amendment are eroded whenever the decision that a search is reasonable is made by a police

officer, regardless of his good faith, except in exigent circumstances. Hard cases make bad law; but the result of this case inevitably reduces the security of every person's property and effects against unconstitutional police intrusion, and undermines the simple principle "that the police must obtain a warrant when they intend to seize an object outside the scope of a valid search incident to arrest." *Coolidge v. New Hampshire, supra,* at 484.

Accordingly, I dissent.

O'Neill, C. J., concurs in the foregoing dissenting opinion.

II.

Petitioner realleges the reasons set forth in I., hereof.

III.

The proscriptions contained in the Fourth Amendment are applicable to the States through the Fourteenth Amendment.

Ker v. *California,* 374 U.S. 23;
Mapp v. *Ohio,* 367 U.S. 643.

IV.

In the case at hand, absolutely no evidence was admitted that was not the direct or indirect result of the unlawful searches, seizures, and arrests.

The exclusionary prohibition extends as well to the indirect as to the direct products of such invasions.

Silverthorne Lumber Co. v. United States, 251 U. S. 385;
Wong Sun v. *United States,* 371 U. S. 471.

The subsequent fruits of the searches and arrest should be suppressed.

CONCLUSION

For the reasons stated, the writ should be granted and the judgment of the Supreme Court of the State of Ohio should be reversed.

The citizens of the State of Ohio, in the light of the Ohio decision, are now subjected to unlawful police instrusions by lockpicking burglarous entries to secure evidence or for general exploratory purposes. Such is offensive to the fundamental concepts of ordered justice and freedom. Other States may also use the decision as predication for similar acts. If such is to stand, the Fourth and Fourteenth Amendments are nullified.

Respectfully submitted,

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APPENDIX A

OPINION AND ORDER OF THE SUPREME COURT OF THE STATE OF OHIO, AFFIRMING THE JUDGMENT OF THE COMMON PLEAS COURT OF LUCAS COUNTY, OHIO

THE State of Ohio, Appellee *v.* Morris, Appellant. The State of Ohio, Appellee, *v.* McSpadden, Appellant.

[Cite as State v. Morris (1975), 42 Ohio St. 2d 307.]

Criminal law—Possession of narcotics—Evidence—Warrantless search of baggage by private individuals, for private purposes—With minimal police participation —"Plain view" contraband seized by police admissible at trial—Preliminary hearing—Not required after indictment—Appeal—Necessity of bill of exceptions.

1. An appellate court will not consider any error which counsel for a party complaining of the trial court's judgment coud have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court. (Paragraph three of the syllabus in *State* v. *Childs,* 14 Ohio St. 2d 56, approved and followed.)

2. Where the facts surrounding a warrantless search of baggage, and seizure of evidence discovered therein, indicate that the search in question was instigated by private individuals, for private purposes, and that the minimal police participation which did occur was done for purposes of protection of the public safety and not with the intent of gathering evidence to be used in a criminal prosecution or otherwise evading constitu-

tional protections, then the search is a private undertaking for purposes of the Fourth Amendment to the United States Constitution, and contraband evidence, thereby coming within the "plain view" of police officers having a legitimate right to be present, is not subject to exclusion at trial under the Fourth Amendment.

3. There is no constitutional right to a preliminary hearing under R. C. 2937.10, once an indictment has been returned by a grand jury, and, absent a showing by a defendant of particularized need for the inspection of grand jury minutes, such latter relief is not required.

4. Where a notice of appeal is directed to an adverse judgment and to the order of the trial court overruling appellant's motion for new trial, a bill of exceptions must be filed with the appellate court in order to bring upon the record the evidence presented by affidavit or otherwise at the hearing on the issue.

(Nos. 74-81 and 74-94—Decided May 21, 1975.)

Appeals from the Court of Appeals for Lucas County.

These two appeals were considered for argument and disposition by this court. They arise out of an indictment returned by the Lucus County grand jury on November 10, 1971, charging defendant-appellants, Alan Murray Morris and Harold Michael McSpadden, together with one Willie Middlebrook, with two counts, namely: (1) Conspiracy to violate R. C. 3719.09, possession of a narcotic drug, and (2) possession or control of a narcotic drug, on or about October 31, 1971, for purposes of sale. A related and identical two-count indictment was returned the same day against Joaquin (John) Ramos.

Prior to trial, motions to suppress and for discovery were filed by defendants, appellants herein. Regarding the motions for discovery, the court ruled, with the stipulation on behalf of the state, that each of the defendants would have the right to inspect all the state's physical evidence to be used in the proceedings. A hearing was held upon the motions to suppress, and, on May 26, 1972, the motions were overruled. Subsequently, defendant McSpadden filed a motion to reconsider suppression of evidence, which was overruled.

The trial commenced on August 10, 1972, and, on August 19, 1972, the jury returned a verdict finding the defendant Morris guilty on both counts of the indictment, conspiracy to violate R. C. 3719.09, possession of a narcotic drug, and possession for sale. McSpadden was found guilty on the first count, conspiracy to violate R. C. 3719.09, possession of a narcotic drug, and on the second guilty of possession of a narcotic drug, a lesser included offense of the charge, possession for sale. Judgments were entered upon the verdicts.

Motions for a new trial were filed on August 22, 1972, and overruled, following a hearing on the motions. Thereafter, appeals were filed, and, on November 26, 1973, the Court of Appeals affirmed the judgements of the Court of Common Pleas.

Subsequent to the trial in this case, appellant Morris was tried in the United Stats District Court, Southern District of New York, with five codefendants, for conspiracy to violate the federal narcotic laws.

Appellant Morris and the five codefendants were found guilty. *United States* v. *Capra* (1973), 372 F. Supp. 600, 603, 609.

In *Capra*, a motion to suppress was filed, challenging the search and seizure at the Toledo Penn Central Railroad Terminal of the same physical evidence, namely, narcotics, upon which the convictions in the case at bar were based.

The District Court denied the motion to suppress after a hearing, and the judgment of the District Court, finding Morris guilty of the conspiracy charges, was subsequently affirmed by the Second Circuit Court of Appeals in *United Stats* v. *Capra* (1974), 501 F 2d 267. The motion to suppress was held to have been properly denied upon the basis that the defendants lacked standing to challenge the search, but both courts, in *dicta*, expressed the opinion that under the circumstances the search in question was reasonable.

Additional facts as are necessary for resolution of this matter are stated in the opinion.

These causes are now before this court pursuant to the allowance of appellants' motions for leave to appeal.

Mr. Harry Friberg, prosecuting attorney, *Mr. Melvin L. Resnick* and *Mr. Charles J. Doneghy*, for appellee.

Hayward, Cooper, Straub, Walinski, Cramer & Co., L. P. A., Mr. Richard S. Walinski and *Mr. John L. Straub*, for appellant Morris.

Mr. John D. O'Connell and *Mr. Roy Daniel Chimnis*, for appellant McSpadden.

Corrigan, J. In case Nos. 74-81 and 74-94, appellants Morris and McSpadden, respectively, cite as error the admission in evidence at trial certain narcotics which, they allege, were obtained in violation of the restrictions of the Fourth Amendment to the United States Constitution, prohibiting unreasonable searches and seizures.

In case No. 74-81, appellant Morris also maintains that the verdicts returned by the jury in the trial of the codefendants on the first count of the indictment are inconsistent and repugnant and must be set aside. Appellant Morris also contends that the procedure whereby the grand jury returns secret indictments constitutes a denial of due process and equal protection of the law; and that Ohio law compels, at the least, a preliminary examination be held or that the accused be provided a copy of the grand jury minutes.

In case No. 74-94, appellant McSpadden maintains that the trial court committed reversible error in denying the defense the opportunity to present new evidence directly related to the veracity of the testimony of the state's toxicology expert witness, in violation of appellant's Sixth Amendment right to confrontation; that the discovery of other new evidence subsequent to the appellate court's decision is directly related to due-process and fair-trial standards of the Fifth and Sixth Amendments to the United States Constitution and mandates reversal of appellant's conviction on the first count of the indictment.

For purposes of this opinion, the appeals in case Nos. 74-81 and 74-94 will be treated jointly on the issues touching the legality of the search and seizure conducted at the Toledo Penn Central Railroad Terminal. The other propositions urged by appellants will be discussed separately as they relate to each case.

I.

Preliminary to a discussion of the legality of the search, is the question of appellants' standing to challenge the search, first raised by the prosecution on appeal.

It is well established that: "It is a general rule that an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court. * * *" (Paragraph three of the syllabus in *State* v. *Childs* [1968], 14 Ohio St. 2d 56.)

It is not necessary for this court to consider whether the "automatic standing" provisions of *Jones* v. *United States* (1960), 362 U. S. 257, have been overruled by *Simmons* v. *United States* (1968), 390 U. S. 377.

Clearly, the defendants were entitled, under *Simmons,* to testify in support of their motion to suppress and the testimony could not thereafter be admitted against them in the trial. In the present case, however, no record was made on the "standing" issue upon which this court could base its review.

Moreover, not only did the prosecution compound the error in failing to object to the appellants' standing to contest the introduction of the evidence obtained in the search, but also in proceeding under the assumption that appellants did, in fact, have standing and in choosing instead to defend the reasonableness of the search.

Had appellants failed to object to the introduction of the evidence obtained in the search prior to trial, their right to object would have been waived. *State* v. *Davis* (1964), 1 Ohio St. 2d 28. Where, as here, the state fails to challenge appellants' standing to object and thereby preserve its record for appeal and instead elects to defend the reasonableness of the search and seizure, it also waives any right to challenge "standing" on appeal. *State* v. *Childs, supra* (14 Ohio St. 2d 56). See, also, *United States* v. *Moody* (C. A. 3, 1973), 485 F. 2d 531, 533, fn. 3, where the court likewise refused to determine, upon appeal, an ap-

pellant's standing to challenge an alleged illegal search and seizure because: (1) Appellant's reliance on "automatic standing" under *Jones* v. *United States, supra* (362 U. S. 257), was reasonable; (2) the issue was not raised by the government until the appeal, and the trial court had no opportunity to examine the question, and (3) the Third Circuit Court of Appeals held for the government on the merits and a decision on the question would have no practical effect on the outcome.

Appellants in case Nos. 74-81 and 74-94 contend that the warrantless search of the suitcase checked in the parcel and baggage room of the Penn Central Railroad Terminal violated their Fourth Amendment right to protection from unreasonable governmental searches and seizures.

Appellants maintain that the search, conducted by the Penn Central baggage agent, Penn Central security officer and Toledo police officers, was not a private search but was tainted by police participation, since the police officers unlocked the suitcase and later examined the evidence therein without a search warrent and without probable cause to search or exigent circumstances justifying a warrantless search. Since a determination as to the constitutional validity of the search in this case requires an examination of the facts surrounding the search, a review of the testimony taken at the suppression hearing and at trial is necessary.

The suitcase in question was checked in at the baggage room of the Penn Central Railroad Terminal in Toledo, Ohio, at approximately 11:13 a.m. on October 20, 1971. The baggage agent then on duty, Milton E. Julert, testified that a man, he later identified as Joaquin Ramos, brought in the suitcase and sought to deposit it at the bag-

gage room. Julert suggested that the suitcase be placed in a coin locker on the main concourse of the terminal where it would be safer. The man insisted, however, that it be checked in the baggage room. He stated that he would leave it for a day or two.

Julert thought that the circumstances under which the bag was deposited were unusual and gave him cause for concern. The baggage room was ordinarily used as a temporary depository for baggage received from incoming trains or to be placed on outgoing trains. The suitcase in question was the first item parcel-checked in the baggage room in six months. In Julert's opinion, the man who left the suitcase seemed "tense and nervous," as if anxious to leave the baggage area, and became hostile when it was suggested that he place the bag in a coin locker: Subsequently, on lifting the bag in order to move it, Julert testified that it felt unusually heavy. Upon rocking it back and forth, he observed that the contents made a "rustling" sound like cellophane or plastic would make. Julert testified that the thought passed through his mind that there may have been a bomb in the suitcase but he dismissed the idea and his primary concern was for protection of the checked suitcase. He stated, however, that he was constantly aware of the bag's presence and concerned about it. Julert, since he was scheduled to be off duty for the next two days, notified Charles W. Sibold, the relief baggage agent, that a suitcase had been checked that day, October 20, 1971, and that an additional 50-cent charge would be levied the following day. On Saturday, October 23, Sibold noticed that the suitcase was still there and was aware that it was expected to remain there only a day or two. Sibold then proceeded to make an examination of the bag, noting the bag's weight and the "swishing" sound it produced.

On Tuesday, October 26, Sibold, observing that the bag had not yet been picked up, asked Julert why he had not contacted the Penn Central Police Department regarding the bag and the manner in which it had been checked. According to Sibold's testimony, Julert responded that he intended to. When, on the following day, October 27, Sibold saw that the bag was still there, he spoke with Captain Albert Blevins of the Penn Central police, relating the circumstances regarding the checking of the bag, the length of time it had been left, its weight, and the unusual sound emanating from within, and expressing a desire to open the suitcase. Sibold stated that his reasons for wanting the bag opened were based upon the excessive weight, sound, and circumstances under which it was checked, which led him to worry that the bag might contain explosives or a bomb and should be opened for protection of the company. Both men then proceeded to attempt to find keys with which the bag might be opened. The keys which the men tried in the lock failed to open it. Blevins told Sibold that he would try to get assistance in unlocking the bag and that afternoon called Detective George Ryan, a personal friend, and his primary contact with the Toledo Police Department. Blevins stated that he was concerned about the contents of the bag after he had made an examination of its exterior similar to that of Julert and Sibold. He thought there might be a bomb in it but felt that handling the bag was not likely to explode it. Blevins and Sibold also stated that the presence of a Penn Central security officer at the opening of unclaimed or suspicious luggage was usually sought in order to witness the opening and thereby protect Penn Central personnel from accusations of theft or damage to the contents occurring during such openings. Blevins then stated that, when he called Detective Ryan, he asked merely for advice as to how to unlock a locked suitcase. Both

Blevins and Sibold felt that the baggage man had the right to open suspicious baggage for protection of the company even though, as a matter of company policy, bags unclaimed for 30 days were usually sent to the company office in Detroit.

On Thursday, October 28, Detective Ryan accompanied by Officer Harry Bedal, of the Toledo Police Armory who had experience in opening locks, were enroute to the Toledo Penn Central Terminal when they met Detective Robert Beavers. Beavers, who was, at that time, assigned to the Metropolitan Drug Unit along with Detective Ryan, was invited to join them. Arriving at the baggage room, Officer Bedal, in the presence of Sibold, Blevins, Ryan, and Beavers, proceeded to unlock the bag's latches successfully with the aid of two paper clips. Sibold then opened the latches on each end and spread the suitcase open. The record is not clear as to who directed Sibold to open the case, but Sibold does state, at one point, "And then I was told that it was Penn Central property, to open it up." After it had been opened, the assembled group observed a number of cellophane bags containing white powder and some towels. Detective Beavers picked up a bag with the initial "C" on it, opened and examined it, showing it to Detective Ryan. The officers had reason to believe the bag contained narcotics and requested a field test kit from the Metropolitan Drug Unit.

The officers' field test indicated a positive result for cocaine from the bag marked "C" and the officers took the bags to a laboratory for further examination. The laboratory examination established that the bags contained the narcotics heroin and cocaine.

On October 31, 1971, a surveillance of the Penn Central terminal by Toledo police resulted in the observation of the

appellants and codefendant Willie Middlebrook driving up to the terminal. Codefendant Middlebrook entered the terminal and presented the claim check for the bag at the baggage room desk and obtained the suitcase. Appellant Morris entered the terminal and met Middlebrook on the main concourse level where Middlebrook attempted to hand the bag to Morris. At this time, Morris and Middlebrook were arrested by Toledo police officers who had been observing them. Subsequently, appellant McSpadden who had been sitting in the back seat of the car in which the three had arrived was also arrested.

The suitcase contained 11 bags of heroin and one bag of cocaine. Measured in kilograms, the contraband weighed 5.35 kilos of heroin and .94 kilos of cocaine. So, the record reflects that the police officers did not happen onto a furtive, alley operation of a couple of shadowy pushers of spoons of drugs but conspicuously, indeed inescapably, a clandestine team operation involving the upper echelons of organized crime. In answer to a question from the court during oral argument, counsel for a defendant stated that the contraband seized had a variously estimated value of from two million dollars to ten million dollars. In either event, the administration of criminal justice must be equal, even-handed, fair and firm, without respect to persons.

Appellants maintain that these facts establish that the search in question was conducted by private parties acting at the direction of and as agents of the Toledo police and that the search and seizure by police officers or their agents does not meet the requirements of any of the recognized exceptions to the warrant requirement and is, therefore, an unreasonable search and seizure prohibited by the Fourth Amendment to the United States Constitution. We disagree.

In *Burdeau* v. *McDowell* (1921), 256 U. S. 465, the United States Supreme Court set down the rule of law that the Fourth Amendment protection against unlawful searches and seizures applies only to action by government authorities or their agents. See also, *Byars* v. *United States* (1927), 273 U. S. 28; *Lustig* v. *United States* (1949), 338 U. S. 74.

The unlawful acts of private individuals in conducting illegal searches and seizures are not subject to constitutional proscription. Where, however, a warrantless search is not an exclusively private undertaking but involves some degree of police participation, then courts must look to the facts surrounding the search in order to determine whether it is an unreasonable police search or an excepted private search.

The United States Supreme Court, in *Byars* v. *United States* and *Lustig* v. *United States, supra,* set out standards for determining whether or not federal government participation in illegal state searches was sufficient to render the evidence secured by state authorities inadminssible in federal prosecutions. Those decisions, beginning with *Byars,* dealt with federal participation in illegal state searches and the extent of participation necessary to invoke the exclusionary rule established in *Weeks* v. *United States* (1914), 232 U. S. 383. *Lustig, supra,* crystallized the participation doctrine into the "silver platter" doctrine. The court, in *Lustig,* stated, at page 78, that a search is a functional process and that " * * * a search is a search by a federal official if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter. The decisive factor in determining the applicability of the * * * [participation doctrine] is the actuality of a share by a federal official in the total enterprise of securing and selecting evidence by other than sanctioned means. * * * " Despite the broad statement by the court as to what constituted federal participation for purposes of the exclusionary rule, the facts, in *Lustig,* indicated participation by federal authorities beyond mere observance of evidence and examination for purposes of prosecution.

The sweeping prohibition against any federal participation in illegal state searches laid down in *Lustig* may also be ascribed to the opinion of some members of the court that no rational distinction existed between state searches and federal searches for purposes of application of the exclusionary rule which would justify the "silver platter" doctrine. It is important to note that the court subsequently overruled the "silver platter" doctrine and extended the constitutional protection against unreasonable searches and seizures to those conducted by state agents. *Elkins* v. *United States* (1960), 364 U. S. 206.

The theory formulated for the problem of federal participation in state searches is analogous to the problem in the present case and some of the standards are useful.

In this vein, we note the Supreme Court's decision in *Byars, supra* (273 U. S. 28), wherein it is stated, at page 32:

> "While it is true that the *mere* participation in a state search of one who is a federal officer does not render it a federal undertaking, the court must be vigilant to scrutinize the attendant facts with an eye to detect and a hand to prevent violation of the Constitution by circuitous and indirect methods. * * * "

This seems to us a better test for examining cases involving private or police-search controversies, especially in view of the facts in the presnt case.

Similarly, a number of federal courts, dealing with the question of police participation in private searches, have based their decisions on the circumstances attending the searches. In *United States* v. *Cangiano* (C. A. 2, 1972), 464 F. 2d 320, vacated on other grounds (1973), 413 U. S. 913, affirmed (C. A. 2, 1973), 491 F. 2d 905, certiorari denied, — U. S. —, 41 L. Ed 2d 1171, the court relied on the fact that government did not instigate the search, and, in *Haerr* v. *United States* (C. A. 5, 1957), 240 F. 2d 533, 535, the court determined that police participation in stopping an automobile was not primarily for the purpose of the discovery of contraband or evidence of guilt to be used in the prosecution of a criminal action.

In those cases, and in numerous others, courts have held illegal searches to be the actions of private individuals even though there was some police involvement in several. More importantly, the preceding cases involved other issues related to the police participation question, such as the right of carriers to inspect goods under tariff regulations and the right to inspect abandoned goods. The police participation question is frequently interrelated with other warrantless search exceptions, for example, consent searches, airline security searches, custodial searches and searches justified by exigent circumstances. *United States* v. *DeBarry* (C. A. 2, 1973), 487 F. 2d 448; *United States* v. *Valen* (C. A. 3, 1973), 479 F. 2d 467; *United States* v. *Wilkerson* (C. A. 8, 1973), 478 F. 2d 813; *United States* v. *Echols* (C. A. 8, 1973), 477 F. 2d 37, *certiorari denied,* 414 U.S. 825; *United States* v. *Burton* (C. A. 8, 1973), 475 F.2d 469; *United States* v. *Lawless* (C. A. 4, 1972), 465 F. 2d 422; *Gold* v. *United States* (C. A. 9, 1967), 378 F. 2d 588; *United States* v. *Pryba* (D.C. D.C. 1970), 312 F.Supp. 466; *United States* v. *Blum* (C. A. 2, 1964), 329 F. 2d 49, *certiorari denied,* 377 U.S. 933; *People* v. *McKinnon* (1972),

7 Cal. 3d 899, 500 P. 2d 1097, *certiorari denied,* 411 U.S. 931.

In those cases, as well as those previously cited, courts have not limited their decisions to any single exception to the warrant requirement, but have examined all the circumstances surrounding the search with an eye to detect and prevent "circuitous and indirect violations of the Constitution" in order to determine its reasonableness in each situation. *Byars* v. *United States, supra,* (273 U.S. 28).

This standard was applied by the Court of Appeals in *Corngold* v. *United States* (C. A. 9, 1966), 367 F. 2d 1, relied upon by appellants. In that case, however, the court's review of all the circumstances surrounding the search by the airline agents showed the search to have been instigated by federal custom agents, conducted solely at their insistence for no purpose of the carrier. Moreover, the packages in question were actively opened by the federal agents. Probable cause for suspecting the packages contained contraband watches had been obtained by means of an exterior search of defendant's apartment with a scintillator prior to any action by the airline baggage agents. The court based its decision that the search was a police search upon the circumstances attendant to it. The majority opinion's suggestion that the search would be a police search even if TWA had instigated it because of the active participation of federal agents in rummaging through the packages can only be regarded as *dictum.* Such a suggestion also appeared in *Lustig, supra,* (338 U.S.74), although the majority decision rested upon more convincing evidence of police participation.

The record in the present case indicates that the search was instigated solely by the Penn Central baggage agent, Sibold, for Penn Central purposes, *i.e.,* the protection of

the baggage, facilities and patrons of the terminal. While the Penn Central baggage agents had no apparent contractual right to open baggage prior to the expiration of a 30-day period in which it remained unclaimed, they did, however, have a right and concomitant duty to protect Penn Central property and the property of passengers and bailees against destruction. Quite clearly, they also had the duty to provide for the physical safety of everyone on Penn Central property.[1]

Had it not been for the difficulty in unlocking the suitcase, the inspection might have remained an exclusively private undertaking.

The Toledo police were called upon, however, to unlock the suitcase. The record is void of any evidence that the

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[1] Patrons of railroad facilities and their agents are business invitees for purposes of the liability in tort of owners and occupiers of land to those injured on their premises. See, for example, *McCann* v. *Anchor Line* (C. A. 2, 1935), 79 F. 2d 338.

Under the common-law rule, first announced in the English case, *Indermaur* v. *Dames* (1866), L. R., 1 C. P. 274, affirmed L. R., 2 C. P. 311, an owner and occupier of premises has a duty to protect business invitees, not only against dangers of which he knows, but also against those which with reasonable care he might discover. The degree of care to be exercised is that commensurate with the danger involved. *Foy* v. *Friedman* (1960), 280 F. 2d 724; *Thompson* v. *Ohio Fuel Gas Co.* (1967), 9 Ohio St. 2d 116; *Tom* v. *Days of '47, Inc.* (1965), 16 Utah 2d 386, 401 P. 2d 946; *Meredith* v. *Reed* (1866), 26 Ind. 334.

A carrier, for example, may be required to protect its passengers from third persons who have threatened them with violence. *Bullock* v. *Tamiami Trail Tours* (C. A. 5, 1959), 266 F. 2d 326.

In the present case, regardless of the duties of the railroad in respect to their liability for damage to property as a bailee or carrier, there clearly exists a duty to protect the passengers, guests and employees of the railroad from physical harm, especially where, as here, they have some reason to believe a package may be harmful. A corresponding right must also exist to inspect packages which the railroad has reason to believe may be harmful. The right to ascertain the existence of danger and to prevent injury must exist if the railroad is to avoid liability for negligence in those cases where dangerous substances are suspected.

police had prior knowledge of the existence of contraband and their "intrusion" into the suitcase was not " * * * with the specific intent of discovering evidence of a crime. * * *." *Cady* v. *Dombrowski* (1973), 413 U.S. 433, 442, fn.

In *Cady,* the facts showed that an off-duty Chicago policeman had been involved in an automobile accident. The rented automobile which the officer had been driving was damaged in the accident, and, at the direction of investigating Wisconsin police officers, it was towed to a privately owned garage. Subsequently, the driver was arrested for drunken driving, and, because of his injuries sustained in the accident, the officers took him to a hospital. The driver was later hospitalized for observation, when, for unexplained reason, he lapsed into a coma. One of the officers, believing that Chicago police officers were required to carry service revolvers at all times, and, not observing one in the possession of the defendant, drove to the garage to find the revolver. While searching the interior and trunk of defendant's rented auto for the revolver, the officer discovered a number of bloodstained objects which were later introduced in the defendant's trial for murder, resulting in a conviction. In upholding the warrantless custodial search of the automobile, the Supreme Court of the United States stated, among other things, that the intrusion into defendant's trunk was not for the purpose of gathering evidence to be used in a criminal prosecution, but was to protect the general public from the possible removal of a revolver by a vandal who might endanger the public safety. Since the officer reasonably believed that the trunk might contain a revolver, the search was in the nature of a custodial or caretaking duty and, the court felt, not unreasonable in light of the facts and circumstances surrounding it. The rationale underlying this decision is particularly applicable to the present case.

Certainly, it would be naive to assume that, here, the police officers would have been uninterested in evidence of a crime if it were presented to them, but they were not required to have a search warrant for the assistance which they supplied. Their actions were limited to unlocking the bag, after which a Penn Central employee opened it. Then, and only then, the police officers examined the contraband in plain view therein. This action amounted to what has been described as a community caretaking function. *Cady, supra,* at 441. What police participation did occur in examining and seizing the contents of the bag is justified under the so-called "plain view" exception to the warrant requirement. *Harris* v. *United States,* 390 U.S. 234 (1968); *Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971); *Cady* v. *Dombrowski, supra.*

This court is of the opinion that the search in question was a private search and that Toledo police officers had every right to be present at the unlocking and opening of the bag in pursuance of their duty to safeguard the safety of the community from the threat of harm. We do not hold, herein, that the threat of harm to the community in all cases justifies police action in derogation of the provisions of the Constitution, but, where all the facts and circumstances surrounding a search demonstrate that it is an essentially private undertaking involving minimal police participaion in the pursuance of a legitimate community functon and without intent to evade constitutional protections, we cannot say the search is unreasonable and in violation of the Fourth Amendment to the United States Constitution.

This result, and the rationale behind it, are consistent with recent federal decisions, and in agreement with the *dicta* expressed in the federal decisions dealing with this same search. *United States v. Capra, supra* (372 F. Supp. 600, 603, 609),[2] affirmed, *United States* v. *Capra, supra* 501 F. 2d 267).[3]

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[2] *United States* v. *Capra* (1973), 372 F. Supp. 603, at 608, reads:

"While the railroad employees did not have or seek legal advice, their conduct was at least consonant with their employer's duties and rights—whether as a non-gratuitous bailee * * * to protect its own property, the property of passengers, and the physical safety of everyone against even modest, if not chimerical, dangers of explosions or other kinds of destruction.

"When the Toledo police officers arrived in this setting, the occasion for their presence was primarily service to those who had enlisted their aid rather than the pursuit or detection of criminals. Undoubtedly, they were prepared to be interested in evidence of criminal misconduct. But they were not required to have a search warrant for the precautionary assistance they came to supply. * * * "In short, the court would sustain this as an essentially private search and a lawful seizure under authorities not always perfectly harmonious but sufficient in their net effect to validate what was done here. * * *"

[3] *United States* v. *Capra* (1974), 501 F. 2d 267, 272, fn. 4, reads:

"Assuming arguendo that the defendants did have standing, this court is in agreement with the trial court's alternative holding, that this was a private search, and not subject to the Fourth Amendment. *Burdeau* v. *McDowell,* 256 U. S. 465, 41 S. Ct. 574, 65 L. Ed. 1048 (1921). The government did not instigate this search, *United States* v. *Cangiano,* 464 F. 2d 320 (2 Cir. 1972), vacated on other grounds, 413 U. S. 913, 93 S. Ct. 3047, 37 L. Ed. 2d 1023 (1973), aff'd 491 F. 2d 905 (2 Cir. 1973), cert. denied, — U. S. —, 94 S. Ct. 3223, 41 L. Ed. 2d 1171; rather, it was motivated by a genuine concern on the part of railroad personnel for the safety of railroad property, fellow employees, and themselves. See *United States* v. *DeBerry,* 487 F. 2d 448 (2 Cir. 1973). This concern was understandably engendered by the unusual baggage check, Ramos' nervous behavior, the weight of the suitcase, the delay in claiming it, and prior exposure, through media and personal experience, to bomb scares. Police participation was not so pervasive tha the opening of the suitcase was primarily for 'the discovery of contraband or evidence of guilt to be used in prosecution of a criminal action.' *Haerr* v. *United States,* 240 F. 2d 533, 535 (5 Cir. 1957). And when police are merely assisting a private party, who has authority to search and a legitimate need to do so, see *United States* v. *Antonelli,* 434 F. 2d 335 (2 Cir. 1970), courts are reluctant to exclude resulting evidence. *Wolf Low* v. *United States,* 391 F. 2d 61 (9 Cir.), cert. den. 393 U. S. 849, 89 S. Ct. 136, 21 L. Ed. 2d 119 (1968). See generally *United States* v. *Blum,* 329 F. 2d 49 (2 Cir), cert. den. 377 U. S. 993, 84 S. Ct. 1920, 12 L. Ed. 2d 1045 (1964)."

III.

Justice Benjamin F. Cardozo, when he was a judge on the Court of Appeals of New York, wrote an often quoted statement in his opinion in the case of *People* v. *Defore* (1926), 242 N. Y. 13, 21, in commenting on the federal rule at that time (January 1926), which later became binding on the states, that evidence of criminality wrongfully seized in a trespass by agents of the federal government should be rejected as incompetent and returned to the defendant on a motion to suppress, and "The criminal is to go free because the constable has blundered."

The minority opinion herein and its assenters seem to approve the mistaken altruism of the society of questers for constables' blunders as apologia for outlawry.

The solicitude for the observance of the mandates of the Fourth Amendment regarding searches and seizures is admirable. But when they reach the facts I am uncertain that we are reading from the same record.

They say for example:

"* * * The police did not arrive to open the suitcase until the day after they were called * * *."

The record demonstrates that the police unlocked the locks on the suitcase but did not open it.

They assert:

"By the majority's decision, it is difficult to avoid the conclusion that the police are now at liberty to open anyone's baggage upon the request of any private citizen * * *."

Again, the record demonstrates that the Toledo police did not open the baggage.

Finally, the dissent presciently premises:

"* * * it is absurd to argue in this situation that the discovery of the contents of the suitcase was in any way inadvertant [*sic*], since their discovery was precisely the purpose for breaking into the suitcase."

For the last time, the Toledo police not only did not break into the suitcase, they did not even open it.

In the United States Supreme Court case of *Boyd* v. *United States* (1886), 116 U. S. 616, there is a memorable observation by Mr. Justice Bradley concerning the duty of courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon. He says that such infrigements should be resisted in the beginnings. He employs the Latin *obsta principiis,* and suggests that such early opposition be the motto of the courts. With equal solicitude the courts should resist at the beginnings encroachments on the rights of citizens to enjoy domestic tranquility free from the vicious outlawry of purveyors of hard drugs. This suitcase of heroin and cocaine being delivered from the importer to the wholesaler at Toledo marked the beginnings of the paths of distribution by pushers and peddlers of these ruinous contrabands, devastating lives of children, adolescents and adults, and wrecking careers, families and homes by catering to and encouraging human frailty and weakness. By the fortuitous circumstances of a private search of the suitcase, a program of cruel, ruthless, inhuman criminality was arrested. And the criminals apprehended should not go free here, because the constable did not blunder.

IV.

In case No. 74-81, appellant Morris maintains that the verdicts returned by the jury in the trial of the codefendants on the first count of the indictment are inconsistent and repugnant. Appellant bases this proposition of law upon both the fact that the jury returned a not guilty verdict for codefendant Middlebrook on the first count of the indictment charging conspiracy while returning guilty verdicts against the appellants; and the fact that the jury returned a verdict of guilty of possession of narcotics for sale against appellant Morris, while finding appellant McSpadden and codefendant Middlebrook guilty only of possession of a narcotic.

An examination of the record discloses nothing inconsistent or repugnant in relation to the jury verdicts rendered as to each of the codefendants on the separate counts of the indictment.

There is evidence that codefendant Middlebrook was merely a dupe in the conspiracy to violate the narcotics laws. Similarly, there is evidence of appellant Morris' intent to sell the narcotics which is inapplicable to the other defendants. There is, additionally, no requirement that judgments on the same count of an indictment in a criminal case be consistent as to codefendants. *State* v. *Hirsch* (1956), 101 Ohio App. 425; *Cleveland* v. *Ryan* (1958), 106 Ohio App. 110.

Appellant Morris contends further that the grand jury procedure whereby secret indictments are returned constitutes a denial of due process and equal protection of the law, and that Ohio law compels, at the least, a preliminary examination be held or that the accused be provided a copy of the grand jury minutes.

In paragraph one of the syllabus in *State* v. *Wigglesworth* (1969), 18 Ohio St. 2d 171, this court stated:

"The only purpose of a preliminary hearing is to determine whether sufficient facts exist to warrant the court in binding the accused over to the grand jury and to set bail, and once an indictment has been returned by the grand jury, a preliminary hearing before a magistrate is no longer necessary. (Paragraph one of the syllabus of *State* v. *Minamyer,* 12 Ohio St. 2d 67; *State* v. *Wilkinson,* 17 Ohio St. 2d 9; *White* v. *Maxwell,* 174 Ohio St. 186; and *Crider* v. *Maxwell,* 174 Ohio St. 190, approved and followed.)"

Likewise, in *State, ex rel. Haynes* v. *Powers* (1969), 20 Ohio St. 2d, 46, 48, this court again reaffirmed its determination that there is no constitutional right to a preliminary hearing, and that, when an indictment is returned by a grand jury, a hearing is no longer required under R. C. 2937.10. See, also, *State* v. *McClellan* (1966), 6 Ohio App. 2d 155, 158, *certiorari denied,* 386 U.S. 1022.

Appellant Morris also failed to show a particularized need for inspection of the minutes of the grand jury and is not entitled to that relief. *State* v. *Laskey* (1970), 21 Ohio St. 2d 187; *State* v. *Rhoads* (1910), 81 Ohio St. 397.

V.

In case No. 74-94, appellant McSpadden maintains that the trial court committed reversible error in denying the defense the opportunity to present new evidence directly related to the veracity of the state's toxicology expert witness, in violation of appellant's Sixth Amendment rights. Appellant also urges that newly discovered evidence, subsequent to the decision of the Court of Appeals and directly related to the due-process and fair-trial standards of the Fifth and Sixth Amendments to the Constitution of the

United States, precludes appellant's conviction for conspiracy on the first count of the indictment and mandates reversal of the conviction.

Both propositions of law lay claim to error in the denial of appellant's motion for new trial on the basis of newly discovered evidence. It is well established in Ohio that, where a notice of appeal is directed to an adverse judgment and to the order of the trial court overruling appellant's motion for a new trial, a bill of exceptions must be filed with the appellate court in order to bring upon the record the evidence presented by affidavit or otherwise at the hearing on the issue. *Keating* v. *Spira,* 52 Ohio Law Abs. 319, 82 N.E. 2d 533 (1948); *E. W. Bohren, Inc.* v. *Dangler,* 97 Ohio App 217 (1954); *Richelin* v. *Gooding Amusement Co.,* 113 Ohio App. 99 (1960), dismissed for want of debatable constitutional question, 172 Ohio St. 342. See, generally, 3 Ohio Jurisprudence 2d 338, Appellate Review Section 428.

In the absence of a bill of exceptions relating to these issues, this court cannot at this time review the actions of the trial court in denying appellant's motions.

For the foregoing reasons, the judgments of the Court of Appeals in case Nos. 74-81 and 74-94 are affirmed.

Judgments affirmed.

Herbert, Celebrezze, W. Brown and P. Brown, JJ., concur.

O'Neill, C. J., and Stern, J., dissent.

Stern, J., dissenting. The mandate of the Fourth Amendment is that "the right of the people to be secure in their

persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated • • • . " In order to ensure that security, the Amendment provides that searches and seizures be upon warrant and probable cause. Where a search is made without a warrant, it is *per se* unreasonable except for a few familiar exceptions. *Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971); *Katz* v. *United States,* 89 U. S. 347 (1947). On the facts of this case, I can find no basis for finding that the warrantless search and seizure herein comes within any of these exceptions, and I accordingly dissent.

Searches conducted outside the judicial process, without the prior approval of a judge or magistrate, are *per se* unreasonable under the Fourth Amendment, for to grant the police authority to decide whether there is adequate evidence to justify their search without a warrant "would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers." *Johnson* v. *United States,* 333 U.S. 10, 14 (1948). A search without warrant may be reasonable where "the exigencies of the situation made that course imperative" *(McDonald* v. *United States,* 335 U.S. 451, 456 [1948]), if the police activity is predicated not only upon probable cause, but also upon a need for immediate action to prevent personal injuries, escape of persons accused of committing a crime, or destruction, removal or concealment of evidence. *Warden* v. *Hayden,* 387 U.S. 294 (1967); *Ker* v. *California,* 374 U.S. 23 (1963). But it is simply not true that any exigent circumstances existed which would justify the action of the police in this case. The police did not arrive to open the suitcase until the day after they were called, and they certainly could have applied for a warrant before the search—or, indeed, they could have taken the suitcase itself to a magistrate. To allow such a search as was con-

ducted here needlessly sacrifices the public interest in the privacy and security of an individual's possessions.

The majority suggest, at least by implication, that the suitcase was suspicious by reason of the sounds emanating from it, its weight, the demeanor of the person who checked it, and the length of time it was checked. Yet not one of these facts, and no combination of them, provide any reasonable basis for a warrantless search claimed to be for the purpose of protecting the public safety. It is claimed that the bag felt unusually heavy. Is that any indication that it might have held a bomb—or narcotics, or books, or any one of the other objects one might imagine? The suitcase made a "rustling" sound when moved. If there is some sinister implication from that sound it escapes me; certainly, it seems most unlikely that explosives "rustle." The man who checked the bag was "tense and nervous." Does that suggest that the bag contained a bomb? The bag was left for a few days longer than expected. Woudn't this lapse of time indicate, if anything at all, that the contents were probably innocent? None of these "suspicions" reflects anything other than certain differences between this bag and the millions of others that pass through the hands of common carriers every year. There were no suspicious sounds, no odors, no leakages, no threats or past incidents suggesting any danger to the public safety. In particular, this is not a case in which any bomb threat was made or, in which there was any other reasonable basis for suspecting an imminent danger to the public safety. The circumstances surrounding the actual opening of the bag also dispel any contention that its potential contents engendeded fear of imminent danger in either the railroad employees or the police; the opening occurred in a small room and was attended by five people who crowded around the bag. By the majority's decision, it is difficult to avoid the conclusion that the police are now at liberty to open any-

one's baggage upon the request of any private citizen, without the need to justify the search before an independent magistrate.

The majority concludes that the restrictions of the Fourth Amendment are not applicable to these appeals because the train station search was a private search. Although I disagree with that conclusion, I agree with the majority that the standards developed by the United States Supreme Court for determining, under the now defunct "silver platter" doctrine, the degree of federal participation which mandates invocation of the Fourth Amendment to an otherwise state search are analogous to, and helpful in, determining that degree of police participation which is sufficient to require that a search which is otherwise private comply with constitutional rules. However, I believe that the majority, while purporting to apply the standards announced in *Byars* v. *United States* 273 U.S. 28 (1927), does nothing more than cite that case. To me, *Byars* is the only reliable United States Supreme Court decision in this area.[4]

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[4] A subsequent case, *Lustig* v. *United States* (1949), 338 U. S. 74, also involved federal participation in a state search. In a 5-4 decision, the court held that the federal participation was such as to require application of the Fourth Amendment. The judgment of the court was announced in an opinion written by Mr. Justice Frankfurter. The clear import of this opinion was that a search is a federal search if there was any federal participation in the serch nd seizure prior to actual appropriation of the seized objects from the premises searched. Stated negatively, the thrust of the opinion was that a search and seizure is not a federal undertaking only if the illegally seized objects are appropriated by the state agents and then delivered to the federal agents "on a silver platter" (338 U. S., at 79).

Applying this rule to the facts of the present appeals would require invocation of the Fourth Amendment to the October 28th depot search and seizure. The police participation in the search clearly occurred prior to appropriation of the suitcase and its contents. In fact, the police were the appropriating parties; the Penn Central agents did not seize the bag and then turn it over to the police.

The material facts in *Byars* are relatively simple. A state search warrant was issued by an Iowa judge to "'any police officer of Des Moines, Polk County, Iowa'" (273 U.S., at 29); the warrant authorized the search of the residence of A. J. Byars for intoxicating liquor, instruments and materials. For reasons not germane to this discussion, the court stated that the warrant was defective under Fourth Amendment standards. The warrant was given to a Mr. Densmore, the local police officer in charge of the night liquor bureau. He and three other local officers proceeded to execute the warrant. However, before leaving the police station to conduct the search, Densmore asked a federal prohibition agent to accompany the search party; the agent assented. At the residence, the federal agent searched the kitchen and found counterfeit liquor stamps. A local officer found and immediately turned over to the federal agent similar stamps. The stamps were used to convict Byars of a federal crime.

In a unanimous opinion, the court, at pages 32 and 33, held that the search and seizure was subject to the Fourth Amendment:

"While it is true that the *mere* participation in a state search of one who is a federal officer does not render it a federal undertaking, the court must be vigilant to scrutinize the attendant facts with an eye to detect and a hand to prevent violations of the Constitution by circuitous and indirect methods. Constitutional provisions for the security of person and property are to be liberally construed, and 'it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.' *Boyd* v. *United States,* 116 U.S. 616, 635; *Gouled* v. *United States, supra,* 304. [255 U. S. 298].

"The attendant facts here reasonably suggest that the federal prohibition agent was not invited to join the state squad as a private person might have been, but was asked to participate and did participate as a federal enforcement officer, upon the chance, which was subsequently realized, that something would be disclosed of official interest to him as such agent. The house to be searched contained only four rooms—a dining room, a kitchen and two bedrooms. We are not prepared to accept the view that the local officer thought a force of four men would be insufficient to search these limited premises; and it is significant, in that connection, that he did not ask his superior officer for additional help, but inquired particularly for Adams, who, he knew, was the federal agent. The stamps found were not within the purview of the state search warrant, nor did they relate in any way to a violation of state law. Those found by the agent were held by him as of right and without question; those found by the state officer were considered by both the local officer in charge and the federal agent as things which concerned the federal government alone and then and there were surrendered to the exclusive possession of the federal agent,—a practical concession that he was present in his federal character. *We cannot avoid the conclusion that the participation of the agent in the search was under color of his federal office and that the search in substance and effect was a joint operation of the local and federal officers.* In that view, so far as this inquiry is concerned, the effect is the same as though he had engaged in the undertaking as one exclusively his own." (Emphasis added.)

The *Byars* case counsels that if police are present when private citizens conduct an unlawful search, the determinative issue in resolving whether constitutional restrictions are applicable is the character of the police presence. If

the police were present primarily upon the chance that something of official interest might be discovered, compliance with the Fourth Amendment is required.

One reason given by the majority to support its conclusion that the October 28th search was a private search is the fact that the search "was instigated by private individuals, for private purposes * * * ." However, the mere fact that the police do not initiate a search does not preclude a finding that the police joined in the search to fulfill an investigative function. Such a finding would convert the search from an exclusively private search into a joint venture between the police and the private individuals.

The majority states that the police "had every right to be present at the unlocking and opening of the bag in pursuance of their duty to safeguard the safety of the community from the threat of harm." To the extent that this statement indicates the majority's conclusion that the police presence and activity in unlocking the suitcase was justified by exigent circumstances, it simply is a contradiction of the facts in the record. However, to the extent that it reflects the majority's conclusion that the police went to the train station primarily to ascertain the contents of the suitcase, it is accurate. Their purpose was to search the suitcase, and a warrant should have been obtained before that search.

The "community caretaking function' mentioned in *Cady* v. *Dombrowski*, 413 U.S. 433 (1973), also does not apply. Any search in the interest of the public safety must have some reasonable basis. In *Cady, supra*, there was some cause for the belief that an off-duty police officer had to carry a revolver at all times and it was standard procedure to retrieve a police service revolver to prevent vandals from getting the weapon. Although the principles underlying that decision are not clear, it appears that the special rules applicable to automobile searches, the fact of a type of police custody of the vehicle, and the existence of exigent circumstances stemming from the difficulties of rural police practice were basic to the decision in that case. Most importantly, the critical factor was the searcher's reasonable belief that the automobile contained a dangerous, but not illegal, object. None of those factors are present here, and the unusual facts of that case provide no support for the proposition that a search claimed to be for the public safety is somehow not subject to the usual requirement that a warrant be obtained, absent exigent circumstances. See *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973). If there were reasonable grounds for belief that the public safety required a search, that search could have been carried out under a proper warrant as readily as under police discretion. The majority suggests no reason why a search for purposes of the public safety should not be subject to the usual requirement that a warrant be obtained, nor can I accept the implication that a police search which is not part of a criminal investigation is any less an intrusion upon privacy or any less subject to the Fourth Amendment.

The reliance of the majority upon the "plain view" doctrine is similarly misplaced. As was stated in *Coolidge* v. *New Hampshire*, 403 U.S. 443, 466 (1971): "What the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused." Even if the search in the present case is somehow considered to be a private search for explosives, the "plain view" doctrine alone would not permit the police to seize the narcotics in the suitcase, because "no amount of probable cause can justify a war-

rantless search or seizure absent exigent circumstances," even where the article seized is contraband. *Coolidge* v. *New Hampshire, supra,* at 468. A private person making a search has no right to seize property, even contraband, and there is no logic in considering a search to be private until the moment at which the seized object comes into plain view, and then finding that the right to seize derives from the fact that the police officers, heretofore considered as private persons, have the object in "plain view." The mere fact that an object subject to seizure is in plain view does not eliminate the requirement of a search warrant, absent exigent circumstances, for the "plain view" rule only applies where the initial police intrusion was lawful. Here, the police were, at best, participants in an unlawful private search, and, at worst, conducting a police search in violation of the Fourth Amendment. The police intrusion in this case was the picking of the suitcase locks in order to open the bag, and this intrusion was unlawful, without warrant, and not made under exigent circumstances. This wrongful intrusion is not a basis upon which the "plain view" rule can be applied.

A second requirement of the "plain veiw' rule is that the discovery of evidence must be inadvertent. It is clear that the purpose of the Toledo police was to participate in a baggage search, and that if explosives had been found, the explosives would have been liable to seizure, or at least to use as evidence against the owner of the bag. They would incriminate as surely as narcotics. It is absurd to argue in this situation that the discovery of the contents of the suitcase was in any way inadvertent, since their discovery was precisely the purpose for breaking into the suitcase. In Fifth Amendment cases, the fact that a judicial inquiry is not for the immediate purpose of criminal prosecution does not prevent the assertion of the

privilege against self-incrimination; so too in Fourth Amendment cases the fact that a warrantless search was for one type of evidence does not act as a bootstrap to justify the seizure and use of evidence of a different kind, for the unwarranted invasion of privacy remains the same.

The cases applying the Fourth Amendment to warrantless search and seizure cannot be reconciled into a set of simple principles. In many of those cases, there is a tension between two conflicting approaches. One approach considers that if a police search is subsequently found to be reasonable, no warrant is necessary, since the warrant requirement applies only to unreasonable searches. The majority apparently adopts that approach in this case. The other approach recognizes that the primary protection of the Fourth Amendment against unbridled police discretion lies in the requirement that a warrant be obtained from an impartial magistrate, and that the fundamental guarantees of the Fourth Amendment are eroded whenever the decision that a search is reasonable is made by a police officer, regardless of his good faith, except in exigent circumstances. Hard cases make bad law; but the result of this case inevitably reduces the security of every person's property and effects against unconstitutional police intrusion, and undermines the simple principle "that the police must obtain a warrant when they intend to seize an object outside the scope of a valid search incident to arrest." *Coolidge v. New Hampshire, supra,* at 484.

Acordingly, I dissent.

O'Neill, C. J., concurs in the foregoing dissenting opinion.

THE SUPREME COURT OF OHIO

Columbus

Certification

I, Sam F. Adkins, Deputy Clerk, Supreme Court of Ohio, do hereby certify that the foregoing opinion is a true and correct opinion as rendered by this court in the case of State v. McSpadden on May 21, 1975, as it appears at 42 Ohio St. 2d 307.

Sam F. Adkins

(Seal)

THE SUPREME COURT OF THE STATE OF OHIO

The State of Ohio, City of Columbus.	1975 Term To wit: May 21, 1975

State of Ohio, Appellee, vs. Harold Michael McSpadden, Appellant.	No. 74-94 Appeal from the Court of Appeals for Lucas County

Affirmation

This cause, here on appeal from the Court of Appeals for Lucas County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed; for the reasons set forth in the opinion rendered herein, *and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.*

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent

to the Common Please Court *to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for* Lucas *County for entry.*

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this 15th day of August, 1975.

Thomas L. Startzman, *Clerk*
/s/ Sam F. Adkins

(Seal)

THE SUPREME COURT OF THE STATE OF OHIO

The State of Ohio, City of Columbus.	1975 Term To wit: May 21, 1975

State of Ohio, Appellee, vs. Harold Michael McSpadden, Appellant.	No. 74-84

Mandate

To the Honorable Common Pleas Court

Within and for the County of Lucas, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals affirmed for the reasons set forth in the opinion rendered herein.

Thomas L. Startzman
Clerk

August 15, 1975
Sam L. Adkins, *Deputy*

Record of Costs

Docket Fee $25.00, Paid by John D. O'Connell

THE SUPREME COURT OF THE STATE OF OHIO

The State of Ohio, City of Columbus. — 1975 Term, To wit: June 19, 1975

State of Ohio, Appellee, vs. Harold Michael McSpadden, Appellant. — No. 74-94

Rehearing

It is ordered by the court that rehearing in this case is denied.

I, Thomas L. Startzman, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No .... Page ....

In Witness Whereof, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 15th day of August, 1975.

Thomas L. Startzman
Clerk
By */s/ Sam L. Adkins, Deputy*

(Seal)

APPENDIX B

OPINION AND ORDER OF THE COURT OF APPEALS OF THE STATE OF OHIO, AFFIRMING THE JUDGMENT OF THE COMMON PLEAS COURT OF LUCAS COUNTY, OHIO

(In the Court of Appeals of Lucas County, Ohio)

(Filed November 16, 1973)

State of Ohio, Appellee, vs. Harold Michael McSpadden, Appellant. — C. A. No. 7312; C. P. No. 71-6082; Decided November 16, 1973

Messrs. Melvin L. Resnick and Charles J. Doneghy, Assistant Prosecuting Attorneys for the Appellee.

Mr. John D. O'Connell, for the appellant.

This cause came on to be heard upon the appeal, the transcript of the docket and journal entries, original papers in the Lucas County Common Pleas Court, the assignments of error, the briefs and arguments of counsel.

As to the following assignments of error:

"I. The trial court erred in permitting appellant McSpadden's case to go to the jury, when the prosecution had proved his mere presence at the time of the offense, and nothing more.

"III. Can an unconscious man (state of being asleep) knowingly, wilfully, and with intent, undertake a criminal act?"

The court finds from the totality of the evidence sufficient evidence to support a verdict of guilty, assignments of error Nos. I and III are not well taken. See United States v. Geaney (1969), 417 F.2d 1116, R.C. 1.17; 10 O.Jur.2d. 68, Conspiracy, Sec. 13, et seq.

As to assignment of error No. IV, to-wit:

> "The court erred in not granting various motions supported by briefs and testimony taken in the pretrial and post trial proceedings in this matter, since such motions applied to all defendants in this matter arising from the same set of circumstances and transactions."

The court finds that assignment of error No. IV is not well taken for the reason that the alleged specific errors were not briefed in appellant's brief and assignments of error filed January 2, 1973, and the court further finds that a hearing was held on the various motions filed by appellant on December 24, 1971, and that R.C. 2941.62 was complied with in this respect. The court further finds that the allegations of the appellant were general as to the proceedures used throughout Ohio as to the selection of a grand jury, that the challenge to the array is permissive and addressed to the sound discretion of the court and that the court permitted the appellant to proffer into evidence his objections to the selection of the grand jury and that the court properly either overruled appellant's plea or found the state's demurrer well taken.

As to assignment of error No. V, to-wit:

> "The court erred in not ordering a new trial on McSpadden's motion for a hearing and to permit the taking of testimony in his motion for a new trial."

Finding no transcript of proceedings pertaining to this assignment of error, said assignment of error is found not well taken.

Assignment of error No. VI:

> "The court below erred in not excluding the testimony of witness, James Nauwens, over timely objections of all defense counsels and in not excluding photographs introduced into evidence by James Nauwens."

Assignment of error No. VII:

> "The court erred in allowing the case to go to the jury over timely motion for a directed verdict, because no testimony proved the charges alleged."

The court finds as to the foregoing assignments of error that proof of association or acquaintance was relevant to the issues and was admissible, that proof of conspiracy may rest upon inferences drawn from relevant and competent circumstantial evidence and that only slight evidence is necessary to link a defendant to the conspiracy, and further the court finds ample substantial evidence of sufficient probative value to sustain the convictions. See U.S. v. Kenny (1972), 462 F.2d 1205; U.S. v. Pope (1969), 415 F. d 685; Phelps v. U. S. (1947), 160 F.2d 858; and Williamson v. U.S. (1962), 310 F.2d 192; 10 O.Jur.2d. 68, Conspiracy, Sec. 13, et seq.; 30. Jur.2d 820, Appellate Review, Sec. 821.

Assignment of error No. II, to-wit:

> "The trial court erred in permitting the narcotics exhibits to be received in evidence, since they were the product of an unlawful police search."

Further finding from the record that the evidence obtained from the search of the Samsonite suitcase at the

Toledo Penn-Central Station was not illegal in that the search was reasonable under the circumstances (See Terry v. Ohio (1968), 392 U.S. 1; United States v. Rabinowitz (1950), 339 U.S. 56). The search did not fall within the Burdeau Doctrine of private searches, (Burdeau v. McDowell (1921), 256 U.S. 465) since conduct by Toledo Police officers in opening the lock was part of an uninterrupted transaction; (Lustig v. United States (1948), 338 U.S. 75), culminating in the physical opening of the bag by the railroad officials and, as such, involved concerted action (United States v. Nelson (6th Cir. 1972), 459 F.2d 884; Corngold v. United States (9th Cir. 1966), 367 F.2d 1); but the search of the suitcase in the possession of the railroad officials was authorized by the valid consent of the officials who obtained equal authority with the bailor over it (See Anderson v. United States (10th Cir. 1968), 399 F.2d 753; Drummond v. United States (8th Cir. 1965), 350 F.2d 983), by virtue of the fact that the suitcase had remained in the possession of the bailee railroad for a period of three times in excess of the period for which the bailor had paid; furthermore, the location of the bailed property was a place not normally used for long-term bailments and after such long lapse of time there no longer remained a reasonable expectation of privacy. Katz v. United States (1967), 389 U.S. 347, distinguished; cf. United States v. Cowan, (2nd Cir. 1968), 396 F.2d 83; exigent circumstances resulted which would justify this search of readily movable bailed goods even though a search under similar circumstances might be unjustified if made in a home or office (See Chambers v. Maroney (1970), 399 U.S. 42; Cooper v. California (1967), 386 U.S. 58; Preston v. United States (1964), 376 U.S. 364; People v. McKinnon (1972), 500 P.2d 1097). Consent provided the right to search and mobility added reasonableness (See State v. Fassler (1972), 503 P.2d 807). Furthermore, defendant failed to show that he possessed standing as a

"person aggrieved"; (Cf. Fed.R.Crim. P. 41(e); State v. Coleman, 91 Ohio L. Abs. 191; People v. McNeil, 290 N.E. 2d. 602); he does not have standing, ipso facto, as a co-conspirator (United States v. Alderman (1969), 394 U.S. 165); and he was not a victim against whom the search was directed (Wong Sun v. United States (1963), 371 U.S. 471). The record contains sufficient evidence to support a finding of lack of standing; the defendant did not bail the suitcase; the baggage claim ticket was in the possession of Middlebrook, who is not an appellant herein; the defendant consistently has failed to assert any interest in the suitcase even though any such self-incriminating statements could not be used against him, Simmons v. United States (1968), 390 U.S. 377. Even if the "automatic standing" provisions in Jones v. United States (1960), 362 U.S. 257, have not been overruled by Simmons, supra, they are not applicable in this case since the indictment charged possession on October 31, 1971, and the alleged illegal search and seizure occurred on October 28, 1971, at a time when defendant did not have possession, did not have a right of immediate possession, and was not on the premises; consequently, the necessity for the state to prove possession on the date of the search and seizure as an essential element of the offense was eliminated. (See Brown v. United States (1973), 93 S. Ct. 1565). Even if the defendant is later found to have possessed standing as to the charge of illegal possession of narcotic drugs for sale in violation of Sec. 3719.20(A), Rev. Code, it is further found from the record that the defendant did not have standing to contest the charge of Conspiracy to Violate Sec. 3719.09, R.C. Assignment of error No. 2 is not well taken.

Brown, J., concurs, but expresses the view that the opening and search of the Samsonite suitcase was a private search by a railroad employee within the spirit and mean-

ing of the Burdeau Doctrine (see Burdeau v. McDowell, 256 U.S. 465; cf. Lustig v. U.S., 338 U.S. 74, distinguishable), and the conduct of the Toledo Police Officers in opening the lock at the request of the railroad officials was separate and distinct from the physical opening of the bag by railroad officials, and as such was not an uninterrupted transaction involving concerted action by the police officers and railroad officials (U.S. v. Nelson, 459 F.2d 884, and Corngold v. United States, 367 F.2d 1, are factually distinguishable).

The judgment of the Court of Common Pleas of Lucas County is affirmed.

Potter, P.J., concurs in the findings as to assignments of error Nos. I, III, IV, V, VI and VII, but dissents as to the judgment. As to assignment of error No. II, to-wit:

> "The trial court erred in permitting the narcotics exhibits to be received in evidence, since they were the product of an unlawful police search."

finds that the search was an unlawful, warrantless police search and not a private search and that federal court decisions relative to the exclusionary rule are applicable. (See Lustig v. United States, 338 U.S. 74; Corngold v. United States (1966), 367 F.2d 1; for additional cases see, 68 Am.Jur.2d. 670, Searches and Seizure, Sec. 13, et seq.; 36 ALR 3d. 553 at 559), that defendant's constitutional rights were not extinguished by the relatively brief passage of time (See time referred to on baggage claim check) the area was one in which there was a reasonable expectation of freedom from governmental intrusion and finding further that the issue of standing was not raised by the State in the trial court or in this court and standing was assumed by all parties, I would remand to the trial court

for an evidentiary hearing on the issue of standing on both counts. If the trial court concludes that the defendant had standing, the motion to suppress should be granted and the defendant afforded a new trial. If the trial court concludes that the defendant does not have standing, then the judgment should be re-entered. See Combs v. United States (1972), 408 U.S. 224.

DECISION AND JOURNAL ENTRY

Court of Appeals of Ohio, Sixth District
County of Lucas

C. A. No. 7312

(Filed November 16, 1973)

State of Ohio, Appellee, vs Harold Michael McSpadden, Appellant.	Appeal from Lucas County Common Pleas Court No. 71-6082

Date: November 16, 1973

This cause came on to be heard upon the record in the trial court. Each assignment of error was reviewed by the court and upon review the following disposition made:

Assignments of error Nos. I, III, IV, V, VI and VII found not well taken. Potter, P.J., Brown & Wiley, JJ., concur.

Assignment of error No. II found not well taken. Brown & Wiley, JJ., concur. Potter, P.J., dissents as to assignment of error No. II and dissents from the judgment. See decision on file.

On consideration whereof, the court finds that the defendant was not prejudiced or prevented from having a fair trial, and judgment of the Lucas County Common Pleas Court is affirmed. This cause is remanded to said court for execution of sentence and for costs. Costs assessed against appellant.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Ten (10) days from the date hereof this document shall constitute the journal entry of judgment and shall be file-stamped by the Clerk of the Court of Appeals, at which time the period for review will begin to run. App. R. 22(E).

Clifford F. Brown &
Frank W. Wiley, JJ.,

_____

Presiding Judge

_____

Judge

_____

Judge

concur.

John W. Potter, P.J., concurs as to assignments of error Nos. I, III, IV, V, VI and VII, and dissents as to assignment of error No. III and to the judgment.

APPENDIX C
CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

AMENDMENT [IV.]

Searches and sizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.